BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

PETITION FOR RECONSIDERATION OF TELE-COMMUNICATIONS, INC.

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SUMMARY

TCI's Petition for Reconsideration will principally address a series of specific decisional errors that will have damaging effects on the cable industry's ability to offer consumers attractive, efficiently priced services. These specific issues are: 1) the Order's imposition of an anti-consumer "must buy" requirement, 2) the Order's preclusion of competitive market rates for multiple unit dwellings, 3) the "cap" placed upon affiliated programming "pass-throughs," and 4) the Order's tantamount prohibition on regional advertising by cable operators. TCI respectfully urges the Commission to reconsider and revise its rate scheme in these important specific respects.

In addition to these specific issues, TCI addresses briefly what it believes to be the fundamental error in the Order and which portends long-term negative consequences for both the industry and the consumer: the adoption of a unitary rate structure for both basic cable services and cable programming services. The Commission's decision to defer the effective date of the current regulations gives the Commission the opportunity to rectify the errors of the existing scheme.

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Tele-Communications, Inc. ("TCI") hereby petitions for reconsideration of the Report and Order issued in the above-captioned proceeding.[1] TCI participated in the initial phase of this proceeding, and thus is an interested party in this proceeding. See Commission Rule 1.106(b)(1).

INTRODUCTION

TCI's Petition for Reconsideration will principally address a series of specific decisional errors that will have damaging effects on the cable industry's ability to offer consumers attractive, efficiently priced services. These specific issues are: 1) the Order's imposition of an anti-consumer "must buy"

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[1] Report and Order and Further Notice of Proposed Rulemaking, Implementation of Rate Regulation Sections of the Cable Television and Consumer Protection and Competition Act of 1992, MM Docket 92-266 (rel. May 3, 1993) (hereinafter, the "Rate Order" or "Order"). For ease of reference, citations herein to

requirement, 2) the Order's preclusion of competitive market rates for multiple unit dwellings, 3) the "cap" placed upon affiliated programming "pass-throughs," and 4) the Order's tantamount prohibition on regional advertising by cable operators. TCI respectfully urges the Commission to reconsider and revise its rate scheme in these important specific respects.

In addition to these specific issues, TCI addresses briefly what it believes to be the fundamental error in the Order and which portends long-term negative consequences for both the industry and the consumer: the adoption of a unitary rate structure for both basic cable services and cable programming services. Once that misstep was taken, responsible decisionmaking necessarily required enormous effort to ward off the inefficiencies and inequities that naturally flow as a consequence of regulating nearly all cable video programming. This prompted the Commission to turn to cost of service showings as an alternative means of establishing rates; otherwise, high cost, and high quality operators would be disadvantaged. This also led the Commission to regulate all levels of equipment. It further required special adjustments to the price cap mechanism in an effort to avoid a regime in which quality programming would otherwise be discouraged.

The list can continue on, but the point is made: there is no reason to make the reregulation of cable rates as comprehensive and as complex as the Order does. Indeed, as the Commission's own regulatory experience should have reminded it,

there is every reason to keep it simple. In his paper submitted with TCI's initial Comments, Drs. Stanley M. Besen, Steven R. Brenner and John Woodbury, widely-regarded experts on regulation, and specifically, the economic regulation of the cable industry, forewarned the Commission of the powerfully negative effects of overregulation.[2] These warnings should not remain unheeded. The Commission's decision to defer the effective date of the current regulations gives the Commission the opportunity to rectify the errors of the existing scheme.

I. THE "MUST BUY" REQUIREMENT CANNOT BE SUSTAINED

As a matter of statutory law, sound policy and constitutional requirement, the Commission must reconsider its imposition of a "must buy" requirement for the basic tier.[3] The Order's requirement precludes cable operators from offering consumers access to a la carte programming (such as pay-per-view (PPV) and premium channels) on a stand-alone basis and forces consumers to purchase the basic service tier before they can purchase any other video service. Neither cable operators nor consumers were so hindered prior to passage of the Act. Any

it bears a very heavy burden of proof. This burden cannot be met in this instance in light of the Act's pro-consumer tenor, its legislative history and § 623(b)(7)(A)'s endorsement of stand-alone programming:

> Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service.[4]

Absent a clear Congressional directive to the contrary, the Commission should eschew an interpretation of the Act that restricts rather than expands consumer choice. Forty percent of television households do not subscribe to cable. These viewers, who have in the main chosen to receive their broadcast signals over-the-air, should not be precluded from accepting cable operators' offers to purchase a la carte programming. Either on a full-time (e.g. HBO) or occasional program basis (e.g. PPV movies and sporting events), the ability to purchase a la carte allows consumers to view programming of special interest to them without having to become "cable" subscribers.

Moreover, a basic buy through requirement stands the Act on its head by recasting its buy through prohibition[5] as a buy through requirement. This aspect of the Order thus does not serve the interests of consumers and is inconsistent with the Act's legislative history.

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[4] Communications Act of 1934, § 623(b)(7)(A) (emphasis supplied).

[5] Communications Act of 1934, § 623(b)(8).

A. "Must-Buy" is Contrary to the Act and its Legislative History

In the face of Section 623(b)(7)'s express endorsement of stand-alone marketing of a la carte services, Section 623(b)(8)(A)'s prohibition of a cable programming services buy through requirement, and the profuse legislative history evincing a Congressional intent to protect and enhance consumer choice, the Commission should reconsider its imposition of a "must buy" requirement.

1. The Act is Pro-Consumer and Access Oriented

The Act announces a Congressional policy of ensuring "[t]hat consumer interests are protected in the receipt of cable service."[6] In this ostensible effort to protect consumer interests, the Act requires that cable operators give consumers access to local broadcast stations on a universally available basic service tier.[7]

The Act thus requires that a basic service tier be offered to -- not foisted upon -- consumers. Providing consumers with

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[6] Act at § 2(b)(4).

[7] The legislative history is replete with statements to the effect that consumers should be assured of access to local

options and giving them the unfettered discretion to choose among these options is a core purpose of the Act:

> This bill will allow people to pay for what they watch. And what is wrong with that? My household watches C-SPAN, ESPN, CNN, WGN, and a bunch of other local stations. Why should households that watch other stations pay for what I watch? And vice versa. It is sort of like when you go to the grocery store to get only skim milk, you do not buy every single dairy product on the shelf -- eggs, whole milk, half-and-half, margarine. No, if you did, you would go broke. This is what the consumer is mad about.[8]

2. Must Carry and Must Buy Invoke Separate and Distinct Policy Considerations

Nothing in the policy goals from which the must-carry provisions of the Act emanate compel or even support the imposition of a must buy requirement. Must carry has been imposed by the Act to prevent cable operators from using "[t]heir market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals."[9] In an instance where a consumer opts not to subscribe to the basic service tier, but instead purchase only a la carte programming, there is no refusal to carry or extraction of favorable terms by the cable operator.

There is no question but that must carry is of benefit to broadcasters. And there is no question but that the imposition of a must buy requirement would benefit broadcasters, at least

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[8] 138 Cong. Rec. H8678 (daily ed. September 17, 1992) (statement of Rep. Upton).

[9] S. Rep. No. 92, 102d Cong. 1st Sess. 41 (1991) (hereinafter, "Senate Report"). See also, Act at § 2(a)(15); H.R. Rep. No. 628, 102d Cong., 2d Sess. 5183 (1992) (hereinafter, "House Report").

marginally. Both must carry and must buy benefit the same

legislative history confirms this policy. The Senate Report states:

> [G]reater unbundling of offerings leads to more subscriber choice. . . . Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire.[12]

A must buy requirement not only abrogates the policy preference for unbundling, it is inconsistent with the unregulated status of PPV and premium programming. Must buy necessarily interferes

fact, this section stands four square against such a requirement since at most it mandates that a consumer subscribe to the basic service tier in order to access "any other tier of service."

As the Commission recognized in the Order, programming offered on a per-channel or per-program basis is not tiered.[13] Neither the multiplexing of a premium service nor the discount packaging of multiple premium services also available on an a la carte basis creates a "tier" under the Act.[14] Because a la carte offerings do not constitute tiers, the plain language of Section 623(b)(7)(A) affirmatively permits cable operators to offer subscribers the opportunity to purchase such programming without also requiring them to buy the basic service tier.

5. The Act Prohibits Certain Buy Throughs and Mandates None

Section 623(b)(8)(A) prohibits a cable system from requiring that its subscribers purchase cable programming services as a condition of access to a la carte programming. This section was included in the Act as a consumer protection measure.[15] It protects the consumer by limiting the right of a cable operator to tie the purchase of premium programming to the purchase of other programming. The Act strikes a balance by allowing the cable operator to require a consumer to buy the basic service

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[13] Rate Order at note 435. See also, Senate Report at 75; House Report at 79.

[14] Rate Order at ¶¶ 326-327.

[15] See 138 Cong. Rec. E1034 (daily ed. April 10, 1992) (remarks of Rep. Markey).

tier -- but not cable programming services -- as a prerequisite to purchasing premium programming.

TCI respectfully suggests that the Commission erred in interpreting the buy through prohibition contained in Section 623(b)(8)(A) as "mandating" a must buy requirement.[16] Nothing in the text of the section (or its legislative history) mandates, or even suggests, a Congressional intent to impose such a requirement.[17] It would have been a simple matter for Congress to draft this section to state that cable operators (1) cannot require consumers to buy cable programming services as a condition of access to a la carte offerings and (2) must require consumers to buy the basic tier as a condition of access to premium offerings. But Congress chose not to include this second clause and the Commission should not subliminally read it in to the section. Such a reading subverts not only the plain language of the section, but its raison d'être as a consumer protection measure.

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[16] Rate Order at ¶ 165.

[17] See House Report at 85 ("This section prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier. . . .") (emphasis supplied).

B. A Must Buy Requirement Poses Serious First Amendment Issues

Two earlier regulatory incarnations of must carry have been struck down as unconstitutional.[18] Congress crafted the must carry provisions of the Act with this knowledge, as is reflected in the lengthy defenses of the constitutionality of these provisions contained in the Senate and House Reports.[19] TCI believes that notwithstanding the drafters' attempts to bring must carry within the First Amendment the provisions ultimately will not withstand court challenge.

The constitutional difficulties with must carry are well documented elsewhere and familiar to the Commission. A must buy requirement invokes these same difficulties and others as well. For not only does must buy force cable operators to offer local broadcasting stations against their will, it also forces subscribers, pursuant to government mandate, to purchase certain speech as the price of access to other speech they desire to

other proceedings, TCI will address here the remaining constitutional questions specific to must buy.

1. Both Subscribers and Pay Programmers Suffer Constitutional Injury from a Must Buy Requirement

A must buy requirement impinges on a subscriber's right to determine what messages he will permit to cross the threshold into his home and which must remain outside. As the Supreme Court noted in Frisby v. Schultz:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. . . . Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes. . . .[20]

The unconstitutionality of a must buy through requirement is strongly suggested, if not compelled, by the Supreme Court's unanimous decision in Rowan v. Post Office Department, 397 U.S. 728 (1970). In Rowan, the Court upheld the constitutionality of a federal statute which it construed to give a householder unfettered discretion to elect not to receive further material from a particular sender. The Court found that the right of a person to be let alone in his own home was paramount to any First Amendment right of the sender.

mailer's right to communicate must stop at the mailbox of an unreceptive addressee.[21]

The rights of a cable subscriber "unreceptive" to the basic service tier are no less constitutionally compelling than those of the addressee in Rowan. Consequently, the right to communicate with him, or the right of the government to force him to receive communications he does not want, must stop at the cable box.[22]

The right of the subscriber "[t]o stop the flow of information into his own household"[23] expounded in Rowan applies to electronic communications. Thus in FCC v. Pacifica Foundation the Court relied on it in upholding the Commission's declaratory order on indecent radio programming. The Court found Rowan applicable because the broadcast at issue could be heard in the home, even though it could be heard outside the home as well.[24]

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[21] Rowan v. Post Office Department, 397 U.S. 728, 736-37 (1970).

[22] The constitutional issues discussed above are likewise applicable to cable programming services if § 623(b)(7) is broadly read by the Commission as a government requirement that a subscriber buy the basic service tier in order to gain access to cable programming services. It is no more constitutionally permissible for the government to require a subscriber to buy CBS News in order to gain access to CNN than for it to require the same purchase in order to gain access to a la carte programming.

[23] Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971).

[24] FCC v. Pacifica Foundation, 438 U.S. 726, 748. See also, 438 U.S. at 731 n.2. Justice Powell's concurring opinion is in accord. See 438 U.S. at 759.

A must buy requirement is constitutionally indistinguishable from a statute or regulation requiring that all private magazine distributors mailing Time magazine to a subscriber's home do so only on the condition that they also buy Newsweek magazine. The residential privacy rights established by Rowan forbid the government from so burdening the consumer.

A must buy requirement likewise tramples the First Amendment rights of a la carte programmers. First, it singles out such programming and burdens it with a governmentally mandated minimum price. Second, it imposes upon a la carte programmers the obligation of delivering the programming of others as a precondition of the government allowing their voices to be heard.

In Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575 (1973) the Court struck down a special use tax on paper and ink used by newspapers. The Court found the statute problematic on two grounds. First, it singled out the press for special treatment thereby giving the "[g]overnment a

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[24](...continued)
involve statutes protecting against other intrusions on the home as "[t]he one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." Carey v. Brown, 447 U.S. 455, 471 (1980). See also, Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring) (characterizing the home as "[t]he last citadel of the tired, the weary, and the sick."); Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("[I]f the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.") A basic buy through requirement presents a more compelling constitutional claim than do such statutes because the intrusion is being affirmatively sanctioned by government fiat.

powerful weapon against the taxpayer selected."[25] Second, its effect was felt only by large newspapers since the tax operated to exempt most publishers from its ambit. The Court held:

> [R]ecognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.[26]

All of the evils of the tax struck down in Minnesota Star are imposed on premium programmers by must buy. For must buy is not only cable-specific, it also targets select speakers within the industry and forces this "[n]arrow group to bear fully the burden. . . ."[27] The fact that must buy is not a tax per se, but instead serves to fill private coffers of other speakers -- broadcasters -- makes it all the more constitutionally intolerable than the taxes at issue in Minnesota Star and its progeny.

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[25] Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575, 585 (1973). See also, Grosjean v. American Press Co., 297 U.S. 233 (1936); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (invalidating sales tax imposed on general-interest magazines but which exempted newspapers, and religious, professional, trade and sports magazines); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (stating "[t]he power to tax a privilege is the power to control or suppress its enjoyment" in invalidating an ordinance requiring all persons canvassing within a city to procure a license by paying a flat fee); Follett v. McCormick, 321 U.S. 573 (1944) (invalidating ordinance requiring all booksellers to pay a flat fee to procure a license to sell books).

[26] Id. at 592.

[27] Leathers v. Medlock, 113 L. Ed. 2d 494, 504 (1991) (upholding application of state gross receipts tax to cable operators on ground that tax was one of general applicability).

2. In Light of its Constitutional Infirmities, the Commission Should Not Read a Must Buy Requirement into the Act

TCI believes that the Commission should take the constitutional problems with must buy into account when reconsidering its imposition. The Commission need not go so far as adjudging must buy unconstitutional. Rather, in light of the fact that the Act can be reasonably construed as not mandating must buy, the Commission should adopt that construction to avoid the serious constitutional difficulties that must buy raises.

The Supreme Court has often held that if the constitutionality of an Act of Congress is called into question it is a "cardinal principle" that the Act should be construed to avoid the question if the alternative construction is "fairly possible."[28] The Court recently noted that this rule "[h]as for so long been applied that it is beyond debate."[29]

The constitutional difficulties with must buy should also prompt the Commission to reconsider its reading of the legislative history in this regard. Despite their exhaustive discussion of the constitutionality of must carry, none of the

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[28] Crowell v. Benson, 285 U.S. 22, 62 (1932); Frisby v. Schultz, 487 U.S. 474, 483 (1988) (describing the "[w]ell-established principle that statutes will be interpreted to avoid constitutional difficulties."); Edward J. DeBartolo Corp.v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988); Communications Workers v. Beck, 487 U.S. 735, 762 (1988); United States v. Clark, 445 U.S. 23, 34 (1980). See also, 2A Norman J. Singer, Sutherland Statutory Construction § 45.11 at nots 14 and sages cited therein (5th ed. 1992)

Congressional reports accompanying the Act devotes so much as a word to the constitutionality of must buy. This would be a stunning omission if Congress had intended that the Act impose a must buy requirement.

II. UNIFORM RATE STRUCTURE REQUIREMENT

In discussing the statutory requirement that a rate structure be uniform within a given geographic area, the Commission ostensibly sought to impose a structure that, while consistent with the specific statutory command, nevertheless tended to "[f]oster competition among video providers, furthering an objective of the Act."[30] However, it adopted an exceedingly narrow approach to achieving the latter objective. The Commission permitted only limited bulk discounts for multiple dwelling units (MDUs) and other high occupancy buildings, required that the structure for these discounts be uniform throughout the geographic area, and imposed a requirement that such discounts must result from cost savings passed on to the consumer or provide other economic benefits to the cable operator. These requirements do not reflect the realities of the of MDU negotiations where the economics vary from deal to deal depending on building size, installation difficulty, term, occupancy rate and other factors.

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[30] Rate Order at ¶ 424.

A. The "Meeting Competition" Defense

Compounding this extremely restrictive view of permissible competition, the Commission did not recognize a "meeting competition defense," similar to that found in the Robinson Patman Act.[31] Such a serious omission not only belies the Commission's statement that it sought to "foster competition," but also clearly does not fulfill the Congressional mandate to "[r]ely on the marketplace, to the maximum extent feasible."[32] Rate structures, including a meeting competition defense, that fulfill the "uniformity" requirement, while at the same time placing more reliance on the competitive marketplace, should be permitted.

A cable operator may face competition in only a portion of a franchise area, or only for certain high occupancy buildings. Moreover, that competition is from operators not saddled with the [redacted]

meet competition in a limited segment of that area, it is unlikely that it would reduce prices anywhere. Second, subscribers outside the competitively affected area are protected by the Commission's benchmark regulation from any increase in prices to compensate for lower prices in the affected area. The Commission recognized this fact when it permitted bulk discounts to certain customers because "[s]ubstantive rate standards will ensure that other customers' rates will remain reasonable."[33]

While the Commission appears to be concerned about possible predatory pricing should a cable operator have discretion to reduce prices in competitive areas, it should be noted that despite the evident concern of the Robinson Patman Act with predatory pricing, the "meeting competition" defense under that Act is absolute, i.e., the defense operates as a complete bar to a predatory pricing claim. This is, in part, based on the rationale that the competitor's price is only matched and not undercut, and since the price level was chosen by the putative victim in the first place, fundamental fairness dictates that he not be heard to complain when another firm matches it. Such a scenario is the essence of competition. Its legality and desirability are supported by the observation of the Supreme Court in Great Atl. & Pac. Tea Co. v. FTC, 340 U.S. 231, 251 (1951), that the meeting competition defense "[m]ay be the primary means of reconciling the Robinson Patman Act with the more general purposes of the antitrust laws of encouraging

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[33] Rate Order at ¶ 424.

competition between sellers." So too, a regulation that provides for a meeting competition defense is the only way to reconcile the uniform rate structure requirement of the Act with its objective of relying on competition "to the maximum extent feasible."

A rate structure that provides for a meeting competition defense is still a "uniform rate structure" within the meaning of the Act. The Commission has recognized that a uniform structure does not require uniform rates.[34] However, the Commission seems to require that rates be differentiated only among different classes of customers. We submit that this is too restrictive a reading of the statutory language. A structure that uniformly permits a meeting competition defense throughout a geographic area is clearly a uniform rate structure for that area. Even under the Commission's class of customer analysis, a class of customers consisting of those offered lower prices by a competitor could be provided in the rate structure.

B. Grandfathering of Existing Contracts

The Commission failed to address the issue of whether existing contracts between cable operators and owners of high occupancy buildings are grandfathered. There is a serious constitutional issue as to whether such contracts may be vitiated. While Congress can retroactively impair private contracts through legislation, Norman v. Baltimore & Ohio R. Co., 294 U.S. 240 (1935), Congressional enactments and administrative

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[34] Rate Order at ¶ 423.

rules are not construed to have retroactive effect unless their language clearly requires this result. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988); DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 912 F.2d 1377, 1389 (10th Cir. 1990). Courts will only allow retroactivity if the legislation expressly, or by necessary implication, intends retroactivity. Nelson v. Ada, 878 F.2d 277, 280 (9th Cir. 1989); Bruner v. United States, 343 U.S. 112 (1952). While it might be argued that the vitiation of an existing contract is technically a prospective application of the legislation, it would undo a private agreement that was reached in the past and therefore in practicality has retroactive effect. Since Congress did not expressly provide for such retroactivity, its legality is questionable.

While the constitutional resolution of the retroactivity issue may be somewhat unclear, the policy reason for declining to vitiate such contracts is crystal clear. The existing bulk rate contracts for high occupancy buildings were typically entered into to meet the competition of alternative distributors of video programming. The rates reflected in them are the product of vigorous negotiation with the MDU owner or manager, based upon the opportunity to accept alternative bids. Since the rates established in such contracts are by definition already at competitive levels, there is less need to subject them to immediate regulation. At the very least, the Commission should permit existing contracts to run their course and, after such expiration, permit "uniform" bulk discounts.

III. CABLE OPERATORS SHOULD BE ALLOWED TO PASS-THROUGH THE FULL AMOUNT OF AFFILIATED PROGRAMMING INCREASES

The Order makes one exception to the pass-through of programming costs -- an express limitation on the pass-throughs permitted for programming services affiliated with cable MSO's.[35] Pass-throughs for increases in the charges of affiliated programmers are limited to the actual price increase or inflation, whichever is less.[36] This decision potentially could decrease programming quality and is contrary to analogous FCC treatment of affiliated transactions for telephone companies.

The Commission adopted this provision because of concerns over "[a]buses that might occur if we permit vertically integrated cable operators to engage in unlimited pass-throughs

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[35] Rate Order at ¶ 252. An affiliated programmer is defined as a programmer with an ownership interest of 5 percent or more.

[36] Id. The Commission must clarify the inconsistency in the Rate Order and its summary of the Order published in the May 21, 1993 Federal Register (58 Fed. Reg. 29736 (1993)). The Order states that an MSO can pass through its affiliated programming costs up to the GNP-PI. (Rate Order at ¶ 252). However, the Federal Register summary states that an MSO can pass through its affiliated programming costs up to the percentage change in the admissions component of the Consumer Price Index (58 Fed. Reg. [redacted]